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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 423.

BRADFORD ELECTRIC LIGHT COMPANY, INC.,
Petitioner

v.

JENNIE M. CLAPPER, ADMINISTRATRIX
OF THE ESTATE OF LEON J. CLAPPER,

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

I.

OFFICIAL REPORT OF OPINIONS BELOW.

The opinion of the District Court of the United States for the District of New Hampshire in this case is reported in R. p. 12.

The opinions on appeal in the Circuit Court of Appeals for the First Circuit are reported in 51 Fed. 2nd 992, and 51 Fed. 2nd 999, R. pp. 131, 145.

The opinion dismissing the appeal and granting the petition for writ of certiorari is reported in 52 Supreme Court Reporter, 118.

II.

STATEMENT OF CASE.

This is an action brought by Jennie M. Clapper of Manchester, County of Hillsborough, State of New Hampshire, as administratrix of the estate of Leon J. Clapper, late of Bradford, County of Orange, State of Vermont, deceased, hereinafter referred to as the plaintiff, against the Bradford

Electric Light Company, Inc., a corporation duly established under the laws of the State of Vermont, with a principal place of business at said Bradford, hereinafter referred to as the defendant, to recover damages for personal injuries resulting in the death of plaintiff's intestate, Leon J. Clapper, on July 30, 1926, while in the employ of the Bradford Electric Light Company, said injuries and death being alleged to be due to defendant's negligence.

The action was originally instituted by a writ dated September 16, 1927, and returnable to the Superior Court for said County of Hillsborough, R. p. 6.

The defendant seasonably petitioned for the transfer of said action to the District Court of the United States for the District of New Hampshire on the ground of diversity of citizenship, the said Jennie M. Clapper being a resident and citizen of New Hampshire, and said Bradford Electric Light Company, Inc., being a resident and citizen of Vermont. R. p. 1.

After the action was entered in the District Court, the defendant filed its answer, brief statement and motion to dismiss, R. p. 7.

The plaintiff filed a motion to reject defendant's brief statement, R. p. 11.

The Court, after hearing the parties, granted plaintiff's motion to reject defendant's answer and brief statement, denied defendant's motion to dismiss, subject to the defendant's exception, as appears by the Court's Rescript, R. p. 12, and the case was tried three times by jury, the third trial resulting in a verdict in favor of the plaintiff in the sum of $4000, R. p. 18.

The defendant is engaged in the manufacture and distribution of electrical energy for light, heat and power purposes. Its distribution system starts at Hartford, Vermont, and runs through the towns of Norwich, Thetford, Fairlee, Bradford, and Newbury, Vermont, and then crosses the Connecticut River into New Hampshire, and runs through the towns of

Haverhill, Bath, Lisbon, Littleton and Bethlehem, New Hampshire, R. p. 68.

Leon J. Clapper was a resident of Newport, Vermont, R. p. 46, until 1924, when he entered the employ of the Bradford Electric Light Company, Inc., at Bradford, Vermont, the contract of employment being entered into in Vermont, and from then on until the date of his death, July 30, 1926, the said Leon J. Clapper continued to be a resident of said Bradford, Vermont, R. p. p. 34, 112.

The plaintiff was employed by the defendant as a lineman, and his duties required his working upon the defendant's transmission lines and distribution system in the states of Vermont and New Hampshire, R. p. 69, 70. At times he performed the duties of a "trouble shooter," or emergency man, who might be sent out at any time to repair sudden breaks in the lines, R. pp. 47, 69, 112.

The defendant had a station at Newbury, Vermont, with certain switches which controlled a transmission line extending to a substation in the town of Haverhill, New Hampshire, located on the easterly side of the Connecticut River, which substation controlled the distribution system in said town of Haverhill. This line extending from Newbury to Haverhill was a single phase system, that is, made up of two wires, R. pp. 32, 71, 118.

In the spring of 1926, a contract was negotiated between the defendant and the Lake Tapleton Club at Lake Tarleton, New Hampshire, whereby the former agreed to extend its lines to the Club and furnish usable voltage, R. p. 71. This contract called for the delivery of service on July 1, 1926, R. p. 71. and in order to comply with its terms it was necessary to change the single phase system then existing from South Newbury to the Haverhill substation to a three phase system by the installation of a third wire, addition of another transformer at the Haverhill substation, and the extension of a third wire on the secondary circuit from Haverhill to Pike, R. p. 72. It was also necessary to run a new three phase line

from Pike to Lake Tarleton, which required new poles, cross arms, etc., trimming out the line and stringing the wires, R. p. p. 72, 73.

The work under the contract on the reconstruction and new construction was started about June 1, 1926, and service was rendered to the Lake Tarleton Club on July 3, 1926, R. p. 72, 79 The work on this contract was performed by defendant's regular employees brought over into New Hampshire each day from the Bradford, Vermont, office, Bradford being about ten miles from Haverhill, R. p. 70. The plaintiff took an active part in all of this work, R. p. 73. Three experienced linemen from Berlin, New Hampshire, were temporarily employed by defendant to assist defendant's regular employees in performing this work, R. pp. 60, 61, 83.

Before any changes were made in the Haverhill substation, the two primary wires leading from Newbury to Haverhill were controlled by two swinging switches located at the top of the poles on the primary side, which switches were controlled or operated by means of a lever extending to the base of the pole, R. pp. 35, 37. The purpose of these switches was to disconnect the current from its source, and when they were open or disconnected, no current could pass into the station, R. pp. 39, 117.

Prior to and after the changes were made at the Haverhill substation there was a switch or disconnect at the Newbury station, which, when open or disconnected, shut off the current to the Haverhill substation, so that the Haverhill substation could be controlled by the switch at Newbury, and when the switch last referred to was open or disconnected, it rendered the Haverhill substation dead or safe to work upon, R. pp. 48, 49, 71.

In changing over the substation at Haverhill from a single phase to a three phase system, no switch or disconnect was installed on the third wire which was run into the substation, so that after the changes were made the Haverhill substation could not be rendered safe to work upon by operating the switch then installed at the Haverhill substation, R. pp. 74, 75

In the evening of July 30, 1926, there was a severe electrical storm in Haverhill, New Hampshire, which blew out certain fuses in the Haverhill substation, R. pp. 27, 88. The plaintiff was requested to go from Bradford, Vermont, across the Connecticut River to Haverhill, New Hampshire, for the purpose of restoring the burned out fuses, R. pp. 89, 90. He went to the Haverhill substation, and before ascending the pole to restore the fuses, opened the switch at the substation, R. pp. 27, 28. Opening or disconnecting the switch at the Haverhill substation did not wholly clear the substation of electricity, and the plaintiff, while engaged in restoring the fuses in the Haverhill substation and in the course of his employment, came in contact with high tension wires and received injuries which caused his death, R. pp. 30, 95. At the time of his death the plaintiff was a resident of Bradford, Vermont, R. p. 112.

The case was then transferred to the Circuit Court of Appeals for the First Circuit on exceptions taken by the defendant, R. p. 19. After hearing the parties, the Circuit Court of Appeals under date of January 8, 1931, handed down an opinion as follows:

> "The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellant recovers costs of appeal," R. p. 154.

The plaintiff seasonably petitioned for a rehearing in the Circuit Court of Appeals, and on June 29, 1931, the Court handed down an opinion in which the following order was made:

> "The judgment of the District Court is affirmed with interest and costs," R. p. 156.

The defendant seasonably petitioned for a writ of certiorari to the United States Supreme Court, which was granted, R. p. 161.

III.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was a contract which purported to release an employer from liability for future negligence.

2. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was contrary to the public policy of New Hampshire.

3. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was not a bar to the maintenance of a common law action in New Hampshire.

4. The Circuit Court erred in that the Court held that the acceptance in New Hampshire by the employer of the Workmen's Compensation Act, Public Laws of New Hampshire, 1926, c. 178, was binding upon the parties in the case at bar to the exclusion of the rights of the parties under the provisions of the Vermont Workmen's Compensation Act.

5. The Circuit Court erred in that the Court held that when the Bradford Electric Light Company, Inc., invoked and defended under the Workmen's Compensation Act of New Hampshire, it then assented that the New Hampshire Statutes should alone govern the rights of the estate of Leon J. Clapper in the case at bar.

IV.

ARGUMENT.

1. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was a contract which purported to release an employer from liability for future negligence.

The Public Laws of Vermont relating to Labor, Chapter 241, provide as follows:

"*Sec. 5763.* ELECTION OF EMPLOYER OR EMPLOYEE; The provisions of this chapter, except sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, shall not apply to an employer or employee unless prior to the injury they shall have so elected by agreement, either express or implied, as hereinafter provided. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter, and shall bind the employee himself, his widow, the employee's widower, personal representative, and next of kin and dependents as hereinafter defined, as well as the employer and those conducting his business during bankruptcy or insolvency."

"*Sec. 5765.* SAME; AS TO CONTRACTS MADE SUBSEQUENT TO JULY FIRST, NINETEEN HUNDRED AND FIFTEEN. Every contract of hiring, verbal, written or implied, made subsequent to July first, nineteen hundred and fifteen, shall be presumed to have been made subject to the provisions of this chapter, unless there is, as a part of such contract, an express statement in writing prior to accident, either in the contract itself or by written notice by either party to the other and to said commissioner, that the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, are not intended to apply, and it shall be presumed that the parties have elected to be subject to the provisions of this chapter and to be bound thereby. In the employment of minors, this chapter shall be presumed to apply unless the notice is given by or to the parent or guardian of the minor. The agreement for the operation of the provisions of this chapter, other than sections five thousand seven hundred and sixty-six, five thousand seven hundred and sixty-seven and five thousand eight hundred and twenty-six, may be terminated by either party upon sixty days' notice to the other and to said commissioner, in writing prior to any accident."

"*Sec. 5770.* INJURIES OUTSIDE OF STATE. If a workman who has been hired in this state receives personal injury by

accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though such injury was received outside of this state."

"*Sec. 5774.* RIGHT TO COMPENSATION EXCLUSIVE. The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter, shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement."

"*Sec. 5762.* GENERAL POWERS OF COMMISSIONER. Questions arising under the provisions of this chapter, if not settled by agreement of the parties interested therein with the approval of said commissioner, shall, except as otherwise provided, be determined by said commissioner. The decisions of said commissioner shall be enforceable by the county court under the provisions of section five thousand eight hundred and nine. From such a decision an appeal shall lie in the same manner as other appeals from said commissioner; but in no case shall such an appeal operate as a supersedeas or stay unless said commissioner or the court to which such appeal is taken, shall so order."

When the plaintiff entered the employ of defendant in 1924, he could elect whether or not he would be bound by the provisions of the Workmen's Compensation Act of Vermont. The Vermont Act, Chapter 241, Section 5763, provides

"The provisions of this chapter . . . . . shall not apply to an employer or employee unless prior to the injury they shall have so *elected* by agreement."

If the plaintiff elected not to be bound by the act, his rights were amply protected, and he could have availed him-

self of these rights by filing the declaration provided for by Section 5765. The plaintiff made no such election, and therefore the contract of hiring is "presumed to have been made subject to the provisions of this chapter." By failing to exercise his right of election, the plaintiff surrendered his "rights to any other method, form or amount of compensation or determination thereof than as provided in this chapter."

The Vermont Act is what is known as the elective type, and in the event of the failure of the employee to elect not to be bound by the provisions of the act so as to retain his common law rights, he is bound by the exclusive remedies provided for in the act.

Smith v. *Van Noy Interstate Co.*, 150. Tenn. 25;
Kennerson v. *Thames Towboat Co.*, 89 Conn. 367, 371;
Powers v. *Hotel Bond Co.*, 89 Conn. 143, 147;
Hopkins v. *Matchless Metal Polish Co.*, 99 Conn. 457, 460;
Gooding v. *Ott*, 77 W. Va. 467;
Hunter v. *Coal Co.*, 175 Ia. 245;
Denny v. *Co.*, 36 N. J. L. 121;
Industrial Commission v. *Ins. Co.*, 64 Col. 480;
Dettloff v. *Co.*, 195 Mich. 117;
Grinnell v. *Wilkinson*, 39 R. I. 447;
Barnhart v. *Steel Co.*, 227 N. Y. 531;
Martin v. *Copper Corp.*, 252 Fed. 207.

One of the principal reasons advanced by the Circuit Court in sustaining the verdict in favor of the plaintiff was that the contract of employment entered into between the parties in Vermont purported to release the employer from liability for future negligence, and therefore could not be sustained in New Hampshire, where the injury was received.

The contract of employment entered into between the parties embodied the terms of the Vermont Workmen's Com-

pensation Act. Does this act purport to release the employer from liability for future negligence?

It is true that there is a line of decisions which holds that any contract which is intended to, and does, relieve a person from *all* liability of whatsoever nature in the event of negligence resulting in injury is void as against public policy.

Baker v. *R. R.*, 74 N. H. 100;
Piper v. *R. R.*, 75 N. H. 228;
Conn. v. *Amusement Co.*, 79 N. H. 450;
Wessman v. *R. R.*, 84 N. H. 475;
Johnston v. *Fargo*, 184 N. Y. 379.

The contract in the case at bar, however, is not a contract of that type. It is just the reverse. In this case the contract entered into between the employer and the employee provided for the payment of compensation in the event of injury arising in the course of his employment, regardless of and aside from any negligence on the part of the employer. The employee could recover in this case under his contract of employment without allegation or proof of negligence on the part of his employer, and the defenses of contributory negligence, assumption of risk and negligence of a fellow servant were not available to the employer to preclude recovery on the part of the injured employee.

In the case of *Mulhall* v. *Company*, 80 N. H. 194, 199, the Court said:

> "While the statutes that have been enacted in response to this conviction are radical in that they create a liability regardless of fault, and in that they abolish or materially modify the long established doctrines of contributory negligence, of assumption of risk and of negligence of a fellow servant, they are highly remedial in that they offer to the employee as a *substitute for the common law action*, a certain and sure remedy applicable to all cases of injury not due to his wilful misconduct. . . . . The statute being remedial is to be construed liberally in order to 'fully and adequately effectuate the purpose of its enactment.'"

The distinction between the class of cases relied upon by plaintiff as relieving an employer from liability for future negligence and that class of cases wherein the employer agrees to pay the injured employee regardless of negligence is made in the recent case of *Western Union Telegraph Company* v. *Esther Tompa,* decided July 17, 1931, and reported in 51 Fed. Rep. 2nd, 1032.

In the *Tompa* case the Telegraph Company, which operated trains over railroad's rights of way, contracted to indemnify railroads against any loss that might be caused by suits brought against railroads by the Company's injured employees. An employee of the Telegraph Company entered into an agreement with the Company providing that she would look solely to the Company for compensation, and that no railroad which the Company had agreed to indemnify should be liable to such employee for injury or death, whether caused by negligence or not.

In construing the validity of this agreement, the Court said:

> "The agreement does not limit the liability of the plaintiff to any private plan of its own for the payment of compensation to its injured employees, but leaves such liability as there may be under the provisions of the New York Workmen's Compensation Law unimpaired. It does deny to the plaintiff the right to sue a third party. We think that such agreements as that made by the defendant have already been held by controlling authority not to be contrary to public policy but valid and enforceable. *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, . . . Compare *Baltimore & Ohio Southwestern Railway Co.* v. *Voigt,* 176 U. S. 498."

As the Court, Wilson, J., in the case at bar, said:

> "It is true that contracts for relief against future negligence in this country are held void as against public policy; but a contract for adequate compensation in case of injury by accident, whether due to negligence of either employer or employee, or occurring without the negligence of either, is

quite different from a contract under which an employee receives no benefit, but relieves the employer from all liability for future negligence. In the one case, it is held to be a contract in the interest of the workman, and in the other, that it is so hostile to his interest and so conducive to neglect on the part of the employer to provide the ordinary provision of safety for its employees, that it is, so far as we know, upheld by no court in this country."

See dissenting opinion, R. p. 149, 150.

Assuming, but not conceding that the contract in question is of that type claimed by the employee, that is, a contract relieving an employer from liability for future negligence, it is valid in Vermont, where made, and should be recognized and enforced in New Hampshire.

Fonseca v. *Cunard Steamship Line,* 153 Mass. 553;
O'Regan v. *Cunard Steamship Line,* 160 Mass. 356, 361;
Stone v. *Old Colony St. Ry.,* 212 Mass. 459, 464;
Mittenthal v. *Mascagni,* 183 Mass. 19;
Wells Fargo & Co. v. *Taylor,* 254 U. S. 175, 188;
Smith v. *Godfrey,* 28 N. H. 379.

In the recent case of *Precourt* v. *Driscoll,* decided by the New Hampshire Supreme Court December 1, 1931, 85 N. H. —, 157 Atl. 525, the New Hampshire Supreme Court applied the law of Vermont with reference to the burden being upon the plaintiff to show herself in the exercise of due care at the time of the accident which took place in Vermont and the case was tried in New Hampshire, even though the New Hampshire Statute, Public Laws 1926, c. 328, s. 13, provided that the burden of proving contributory negligence on the part of the plaintiff shall be upon the defendant. The Court said in its opinion:

"When no domestic interest contravenes, foreign law will be invoked to cover foreign transactions regardless of local statutes as well as of local common law."

In the recent case of *Adams* v. *Thayer*, decided by the New Hampshire Supreme Court, June 25, 1931, 85 N. H. —, 155 Atl. 687, the Court recognized a contract made in Massachusetts and applied the statute of frauds to bar recovery in an action brought on the contract in New Hampshire even though it was doubtful if the same result would have been reached if the contract had been made in New Hampshire.

In the case of *Barnhart, Admx.* v. *American Concrete Steel Company*, 227 N. Y. 531, the plaintiff was employed in New Jersey by a New Jersey corporation and was killed while temporarily working in New York. At the time of his employment, New Jersey had a compensation act, the provisions of which were analagous to the Vermont act. Suit was instituted at common law in New York to recover damages for his death, and the plaintiff claimed that the New Jersey Workmen's Compensation Act did not apply because it was contrary to the public policy of New York, citing and relying upon *Johnston* v. *Fargo*, 184 N. Y. 379, which was an agreement relieving an employer from liability for future negligence.

In dismissing the common law action, the Court, McLaughlin, J., said, p. 537:

> "I can see no analogy between this case and the case presented in *Johnston v. Fargo, supra.* This is not an attempt to relieve the employer from liability. It is nothing more than an attempt to establish a scale of compensation which shall give the employer a remedy for all injuries, whether due to negligence or not. There is no doubt that such a contract would bind the employer, and if so, no reason has been suggested why it ought not to bind the employee. If it did bind him, then at the moment of his death, his common law right of action had been barred, and being barred against him, it was barred also against his representatives. The contract of employment was valid in New Jersey, and being so, prevents the maintenance of an action for the recovery here sought in New York. *Piatt* v. *Swift & Co.*, 188 Mo. App. 584; *Pender v. H. & B. Amer. Machine Co.*, 35 R. I. 321."

Whenever any occasion has arisen for the New Hampshire Supreme Court to interpret the Workmen's Compensation Act of this state or to apply it to any particular situation, the Court has repeatedly held that the act is remedial and is to be liberally construed.

Mulhall v. *Co.*, 80 N. H. 194, 199;
Brown v. *Co.*, 82 N. H. 78, 79;
Gordon v. *Co.*, 83 N. H. 221, 222;
Guay v. *Co.*, 83 N. H. 392;
Holland v. *Co.*, 83 N. H. 483;
Arsenault v. *Lepage*, 84 N. H. 497;
Manchester St. Ry. Co. v. *Barrett*, 265 Fed. 557, 560, 561.

The United States Supreme Court in the case of *Madera Sugar Pine Company* v. *Industrial Accident Commission of California*, 262 U. S. 499, said that state Workmen's Compensation Acts, providing for the liability of the employer to make compensation for injuries received by an employee, irrespective of the question of negligence, are sustainable on the broad ground that the state, by reason of its public interest in the safety and lives of employees engaged in hazardous occupations, may provide in the exercise of its police power that the loss of earning power sustained by an employee shall be charged against the industry and not solely on the ground of the state's interest in preventing injured employees or their dependents from becoming public charges.

2. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was contrary to the public policy of New Hampshire.

The majority opinion sustaining the verdict in favor of the employee was based upon the ground that the contract of employment entered into in Vermont between the employer and employee, changed the public policy of New Hampshire. Opinion, R. p. 145.

In the case of *Johnson* v. *Ismert-Hincke Co.*, 116 Kans. 734, the Court said:

> "The Workmen's Compensation Law fixed the liability of an employer to his employee where both parties are under the law and this liability is founded upon the contract of employment and the statute. *The liability in no sense depends upon tort. It is a liability growing out of a contract, the terms of the statute being embodied in the contract.*"

The New Hampshire Supreme Court in the case of *Mulhall* v. *Company*, 80 N. H. 194, recognizes that the Workmen's Compensation Act of the state of employment enters into and becomes a part of the contract of employment, because in the *Mulhall* case at p. 200, the Court said:

> "'Neither employer nor workman, unless he so chooses, comes within the act. *When both so elect, the act becomes a part of the contract of employment.*' Hotel Bond Company's Appeal, 89 Conn. 143."

In the case of *Liberato* v. *Royer*, 270 U. S. 535, the Court, Holmes, J., said:

> "The compensation act offers a plan different from the common law, and the workman is free not to come in under it. If he does, of course all benefits dependent on the new arrangement are matters of agreement and statutory consequences of agreement, and cannot be carried further than the contract and statute go."

That the terms of the Workmen's Compensation Act of Vermont entered into and formed a part of the contract of employment between the parties is not seriously contested by the employee, but it is claimed that the Workmen's Compensation Act of Vermont is contrary to the public policy of New Hampshire because it differs in some of its terms and provisions from the New Hampshire Workmen's Compensation Act.

"But it by no means follows that because the statute of one state differs from the law of another state, therefore it would be held contrary to the public policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state because against the public policy of our laws it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens."

Northern Pacific Ry. Co. v. *Babcock*, 154 U. S. 190. Opinion, R. p. 142.

In the case of *New York City Railroad Company* v. *White*, 243 U. S. 188, 200, the Court said:

"This Court repeatedly has upheld the authority of the states to establish by legislation departures from the fellow servant rule and other common law rules affecting the employer's liability for personal injuries to the employee."

It is to be noted with interest that the majority opinion states no reasons nor cites any cases in support of its position.

If the case of *Saloshin, Admr.* v. *Houle*, 85 N. H. —, 155 Atl. 47, is cited as an authority in support of the Court's position, it is clearly inapplicable and not in point.

We are in accord with the analysis of the *Saloshin* case as made by Wilson, J., in his dissenting opinion, R. p. 149, , and contend that it is an authority for, rather than against the employer.

The Workmen's Compensation Act of Vermont differs from that of New Hampshire in that under the Vermont Act, the employee must make his election to retain his common law rights when entering the employ of his master, and prior to

receiving the injury, otherwise he is presumed to have accepted, and is bound by, the provisions of the act, while in New Hampshire the employee has the right to elect after receiving the injury whether he will accept compensation or proceed at common law. In other words, both acts are elective, the only difference being as to the time of making the election, but once the election is made, it is binding upon the employee to the exclusion of all other remedies.

It is because of this difference it is contended the Vermont act is contrary to the public policy of New Hampshire.

The term "public policy" has been judicially defined numerous times, but the majority of courts agree that under the rules of comity, contracts valid in the state where made will be enforced unless the agreement "is contrary to good morals of the state, or its citizens would be injured by its enforcement, or it perniciously violates positive written or unwritten prohibitory law."

For other definitions of "public policy," and its application to contracts, see *"Words & Phrases,"* Vol. 6, p. 382.

In the case of *Twin City Pipe Line Company* v. *Harding Glass Company,* 283 U. S. 353, the Court, Butler, J., said:

> "The general rule is that competent persons shall have the utmost liberty of contract, and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. *Printing Co.* v. *Sampson,* L. R. 19, Eq. 462, 465; *B. & O. S. W. Ry.* v. *Voigt,* 176 U. S. 498, 505. The meaning of the phrase 'public policy' is vague and variable; Courts have not defined it and there is no fixed rule by which to determine what contracts are repugnant to it. The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests."

We respectfully submit that a careful analysis and comparison of the two acts will satisfy this Court that the Vermont act is not contrary to the public policy of New Hampshire.

"The mere fact that statutes of different states of the same general character differ in some feature does not render a contract entered into in one state and valid under its statute, unenforceable in another state because it does not conform to its statute. *Swann* v. *Swann*, 21 Fed. 299, 306; *Reynolds* v. *Day*, 79 Wash. 499, 502; *Herrick* v. *Minneapolis & St. L. R. Co.*, 31 Minn. 11; *Northern Pac.* v. *Babcock*, 154 U. S. 190; *Chicago & E. I. R. Co.* v. *Rouse*, 178 Ill. 132; *Higgins* v. *Central N. E. & W. R. Co.*, 155 Mass. 176, 180; *Dennick* v. *R. R. Co.*, 103 U. S. 11; *Barnhart* v. *Am. Concrete Steel Co.*, 227 N. Y. 531; *Schweitzer* v. *Hamburg-American Line*, 138 N. Y. S. 944; *Howard* v. *Howard*, N. Car. Sup. Ct., decided April 1st, 1931; *Bliss* v. *Houghton*, 16 N. H. 90, 91, 92; *Adams* v. *Gay*, 19 Vt. 358, 367; 2 *Kent* 117, 118."

Opinion, R. p. 151, 152.

It is the position of the employee that under the provisions of General Laws of New Hampshire, 1926, c. 178, he has the right to elect after the injury whether he will accept compensation or proceed at common law to recover damages for the injuries sustained. He claims that he is within his rights under the provisions of New Hampshire law when he elects to proceed at common law rather than to accept compensation. That the position of the employee is untenable and unsound is supported by numerous authorities.

"If the employee or his representative had also accepted the New Hampshire act and sought to enforce his rights under that act, the New Hampshire courts, in accordance with the most recent decisions, would have refused to award compensation under the New Hampshire act and referred her back to Vermont, where his contract of employment was made. *Petitti* v. *Pardy Construction Co.*, 103 Conn. 101, 109; *Minto* v. *Hitchings*, 198 N. Y. S. 610; *Schweitzer* v. *Hamburg American Line*, 138 N. Y. S. 944; *Barnhart* v. *American Concrete Co.*, 227 N. Y. 531; *Norman* v. *Hartman Furniture Co.*, 84 Ind. App. 173."

Opinion, R. p. 153.

Workmen's Compensation Acts in various states, the terms of which are almost identical with those in the case at bar,

have been considered by the Federal Courts and courts of last resort of various states, and in no case has any such statute been held invalid as against public policy or in violation of any constitutional provision on this ground.

Opinion of Justices, 209 Mass. 607, 610, 611;
Mackin v. *Co.,* 187 Mich. 8;
Amer. Radiator Co. v. *Rogge,* 86 N. J. L. 436;
Johnston v. *Corporation,* 248 Fed. 407;
Hopkins v. *Co.,* 99 Conn. 457, 460;
Cram v. *Riley,* 214 Mich. 218;
Industrial Commission v. *Ins. Co.,* 64 Col. 480;
Rounsaville v. *Co.,* 87 N. J. L. 371;
Pierce v. *Storage Co.,* 185 Ia. 1346;
Foughty v. *Ott,* 80 W. Va. 88;
Chambers v. *District Court,* 139 Minn. 205;
Anderson v. *Co.,* 169 Wis. 106;
Post v. *Berger & Gohlke,* 216 N. Y. 544;
Hosper v. *Hungerford Smith,* 230 N. Y. 616.

"It is now well settled that compensation acts are not contrary to public policy, but are everywhere recognized as humane, economic, and in the interest of the employee and the general welfare of the state; and nowhere is this more admirably stated than in *Mulhall* v. *Nashua Mfg. Co.,* 80 N. H. 194. * * * In view of the declarations in *Mulhall* v. *Nashua Mfg. Co., supra,* we cannot conceive of the New Hampshire Court of last resort holding as a general proposition that a statute which has been adopted in so many states and acclaimed far and wide as one of the most beneficent acts of recent years in promoting the general welfare of the working man, is contrary to the general welfare of the citizens of New Hampshire."

Opinion, R. p. 139.

3. The Circuit Court erred in that the Court held that the contract of employment entered into in Vermont between the employer and employee was not a bar to the maintenance of a common law action in New Hampshire.

In the case of *Pritchard* v. *Norton*, 106 U. S. 124, the Court said:

> "The Circuit Court of the United States . . . . . in a cause . . . . . in which its jurisdiction depends on the citizenship of the parties adjudicates their rights precisely as would a tribunal of the state according to the laws of the state; so that, in that sense, there is no question as to what law must be administered. But in case of contract, the foreign law may by the act and will of the parties have become part of their agreement, and in enforcing this the law of the forum may find it necessary to give effect to a foreign law which without such adoption would have no force beyond its own deed. . . . . .
>
> "The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself or inhering in it or attaching to it, is governed by the law of the contract."

In accordance with the rule laid down in the *Pritchard* case, the compensation act of the State of Vermont, being a vital part of the contract of employment entered into between the employer and employee, must be considered in determining the rights and remedies of the parties in this action. Accordingly, by virtue of the contract of employment entered into between the parties in Vermont, which provides for the payment of compensation by the employer to the employee and which excludes "all other rights and remedies of such employee" (Vermont General Laws, p. 241, s. 5774), the employee is barred from maintaining a common law action against his employer to recover damages for injuries arising out of the employment.

> "As between employer and employee, the remedy provided by the Workmen's Compensation Act is exclusive."
>
> *Kenneson* v. *Thames Towboat Co.*, 89 Conn. 367, 371;

Powers v. *Hotel Bond Company*, 89 Conn. 143, 147;
Hopkins v. *Metal Polish Co.*, 99 Conn. 457, 460;
Gooding v. *Ott*, 77 W. Va. 467;
Hunter v. *Co.*, 175 Iowa 245;
Denny v. *Co.*, 36 N. J. L. J. 121;
Industrial Commission v. *Ins. Commission*, 64 Col. 480;
Dettloff v. *Co.*, 195 Mich. 117;
Grinnell v. *Wilkinson*, 39 R. I. 447;
Barnhart v. *Co.*, 227 N. Y. 531;
Martin v. *Corp.*, 252 Fed. 207;
Shade v. *Co.*, 92 Kans. 146;
McRoberts v. *Co.*, 93 Kans. 364;
Moeser v. *Shunk*, 116 Kans. 247;
Johnson v. *Co.*, 116 Kans. 734;
Grant Smith Porter Ship Co. v. *Rohde*, 257 U. S. 469.

"In *Tennessee Coal Company* v. *George*, 233 U. S. 354, 359, the Court says, 'There are many cases where right and remedy are so united that the right can not be enforced except in the manner and before the tribunal designated by the act. For the rule is well settled that, "where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone, must be employed."' *Galveston Ry.* v. *Wallace*, 223 U. S. 481, 490, 32 S. Ct. 205; *Stewart* v. *B. & O. R. Co.*, 168 U. S. 445."

Texas Pipe Line Co. v. *Ware*, 15 Fed. 2nd, 171.
See also *Pollard* v. *Bailey*, 20 Wall. 520, 527; *National Bank* v. *Francklyn*, 120 U. S. 747, 753.

The *General Laws of New Hampshire*, 1926, in effect at the time the common law action was instituted in New Hampshire provided as follows, c. 178, s. 11:

"Barring Suit at Law. The right of action for damages caused by any such injury at common law or under any

statute shall not be affected by this chapter; but in case the injured workman, or in event of his death, his executor or administrator, shall avail himself of this chapter either by accepting any compensation hereunder by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury."

By the provisions of the Vermont act, the employee is presumed to have accepted its terms in the absence of the filing of a declaration not to be bound by it. No such declaration was filed by the employee in the case at bar. It is to be noted further that the Vermont Workmen's Compensation Act contains the so called extra-territorial clause, and applies to injury arising outside of the State of Vermont, and of necessity covers the accident in question. It therefore follows that prior to the institution of the common law suit in New Hampshire, the employee had already accepted and was bound by the provisions of the Workmen's Compensation Act of Vermont, which, not only by its terms, but by the statutes and decisions in New Hampshire, barred his estate from maintaining a common law action in New Hampshire.

"One who has accepted the provisions of the Workmen's Compensation Act is barred from maintaining a common law action for negligence to recover for the same injury."

Watts v. *Co.*, 79 N. H. 299;
Davis v. *Co.*, 82 N. H. 87.

In the case of *Dahn* v. *Davis*, 258 U. S. 421, the Supreme Court recognized the principal that one who has elected to accept and receive compensation for injuries arising out of his employment was thereby debarred from an action against the employer to recover damages for negligence causing the injury.

The Courts have repeatedly granted compensation in accordance with the provisions of the Workmen's Compensation

Act in the state where the contract of employment was made, even though the injuries were received outside the state of employment.

Smith v. *Van Noy Interstate Co.*, 150 Tenn. 25;
Zurich Co. v. *Industrial Commission of Wis.*, 213 N. W. 630;
Kennerson v. *Co.*, 89 Conn. 367;
Haulfroit v. *Escanaba Roofing Co.*, 188 N. W. 411;
Cram v. *Riley*, 214 Mich. 218;
Post v. *Berger-Gohlke*, 216 N. Y. 544.

A case directly on all fours with the case at bar is that of *Ora Scott* v. *White Eagle Oil & Refining Company*, District Court of the United States for the District of Kansas, decided February 3, 1930. In the *Scott* case the contract of employment was entered into in the State of Missouri, and was continued for a period of one year. At the time the contract was entered into, Missouri had a Workmen's Compensation Act similar to the Vermont Act. The injury to the plaintiff occurred in the State of Kansas while he was working for defendant under this contract of employment. At the time of the accident, the State of Kansas also had in force the Workmen's Compensation Law.

A common law action was instituted in Kansas to recover damages for the injuries sustained by the plaintiff, which he claimed were due to the defendant's negligence. The Workmen's Compensation Act of Missouri was pleaded as a bar to the maintenance of the common law action in Kansas.

The Court, in dismissing the action in Kansas, said:

"The Workmen's Compensation Law of the State of Missouri enters into and forms a part of every contract of employment made in that state, and entitles a workman under its terms to recover for an injury received [illegible] without the state. Such a contract, it has been many times held, goes with the workman wherever he goes. See *Cram* v. *Leonard Crossett & Riley*, 214 Mich. 218; *Grinnell* v. *Wil-*

kinson, 39 R. I. 447; *State Ex rel Brewen-Clark Syrup Co.* v. *Missouri Workmen's Compensation Commission*, 59 A. L. R. 737; *Smith* v. *Van Noy Interstate Co.*; 262 S. W. 1048.

"This being true, as I conceive the law to be, plaintiff's right of action for compensation is in legal effect an action for the breach of his contract of employment with defendant as made, and is enforceable in any jurisdiction in which the plaintiff may acquire jurisdiction of the person of defendant, and the compensation assessed in such a case is assessed under the provisions of the law of the state of the contract. All a party in such a case is required to do is to bring his action and show, under his contract of employment, he received an injury and that he has complied with all the conditions precedent on his part to be complied with to avail himself of the protection of the law. It is thus seen the law of the place of contract governs the rights of the parties in this case for that they are bound by the terms of the contract. As further seen, this law is in its terms exclusive. It is contractual and may be enforced by plaintiff on performance of its conditions precedent to be performed in any court in which he may obtain jurisdiction over the person of the defendant. *This renders it clear plaintiff had at the time of his injury and at the time this action was brought, no common law right of action remaining which he can enforce as against the contract which he entered into.*"

New Hampshire is bounded on the east by Maine, on the south by Massachusetts, and on the west by Vermont. The compensation acts of the three states Maine, Massachusetts and Vermont are the same, and each contains the extra-territorial clause. The importance of the case at bar is appreciated when we take into consideration the fact that employees are constantly entering the State of New Hampshire in the course of their employment from these three states, and especially is this so where the employer's place of business adjoins or is near the boundary line. The Court will readily appreciate the force and effect of the contract entered into between the employer and employee in the state where the employee was hired which fixes the rights, liabilities and

remedies of each of the parties for accidents arising out of the employment.

In the case of *Kennerson* v. *Thames Towboat Company*, 89 Conn. 367, the Supreme Court of Connecticut construes the Connecticut act with reference to injuries sustained outside of the State of Connecticut. In that case the dependents of deceased claimed compensation under the Connecticut act for death resulting within the navigable waters of New Jersey. The contract of employment was made in Connecticut, and the services to be performed were to be performed partly within and partly without the state.

The principal point decided was whether or not the Connecticut statute had any extra-territorial effect, but the reasoning of the Court and its comment are argumentative and support the reasoning advanced in other cases. The Court said:

> "The remedy provided by our compensation act is substitutionary in character, furnishing what was purposed to be a more humanitarian and economical system as a substitute for one deemed wasteful to industrial enterprises and commerce, and unfair to employees. Its intent was to afford its protection to all Connecticut employers and employees who might voluntarily choose to make its provision for compensation for injury a part of their contracts of employment. . . . . It intended that the employee should know what compensation he or his dependents would receive in the event of injury, and that payment should be made speedily by a procedure at once simple and inexpensive. It intended that the employer should know his liability in this regard, and so might include it among the items charged to operation. If our act intends its contracts of employment to include compensation for injuries occurring only within our jurisdiction, it manifestly defeats its own ends. In that case the employer may not charge to the industry the compensation for injuries occurring without the State, and the employee or his dependents may not collect the same. Neither employer nor employee can know what portion of this period of employment will be subject to the provisions of the Act and no provision for insurance of this liability will be practically possible,

since it may not ordinarily be known what part of the service will be in and what part out of the State, or in what jurisdiction the service will be performed, in industries and commercial enterprises engaged in intrastate and interstate employment. The State boundary is not the limit of very many businesses. To subject them to the laws of the many jurisdictions in which they may be engaged will be especially burdensome to them, and involve them probably in greater expense and liability and far greater difficulties than under the old system. Equally hard will it prove to the employee since he must pursue his remedy in the State of the accident, or the federal court applying that State's law, and thus he may be brought under any one of many different compensation Acts, with whose provisions he cannot hope to be familiar, some Acts contractual in character, some compulsory, some optional, and some *ex delicto,* and he may find he has forfeited the benefit of the foreign Act through failure to comply with its provisions. A reading of the several Acts now in force convinces us that these difficulties are not imaginative, but imminent actualities."

Wilson, J., in his dissenting opinion, appreciated this situation because he said, R. p. 147,

"I cannot agree to the majority opinion that a Vermont contract of employment, both parties to which were domiciled in Vermont and accepted its Workmen's Compensation Act, will not be recognized as valid by this Court because it is against the public policy of New Hampshire where an injury occurred on the ground that it undertakes to relieve an employer from liability for future negligence. The case is one of new impression and owing to the peculiar nature of the New Hampshire Employers' Liability and Compensation Act, is unique in the issues it presents, *and of importance to employers, especially in adjoining states,* otherwise I should not deem it necessary to present my views at length."

The *Massachusetts Workmen's Compensation Act, General Laws,* c. 152, s. 26, has recently been amended by statute 1927, c. 309, s. 3, so as to apply to injuries received within the scope of employment outside of the state.

It will be noted that at the time the *Gould's Case,* 215 Mass. 480, was decided, which is now the minority rule, the Massachusetts act did not have the extra-territorial clause, but since the amendment above referred to, the Massachusetts Supreme Court has passed upon same and decided it in accordance with the majority rule, supported by the cases we have cited.

The case referred to is *Alphonse Pederzoli's Case,* decided January 3, 1930, 269 Mass. 550. In this case the plaintiff was hired in Massachusetts, and in the course of his employment, had occasion to do work in the State of New Hampshire, wherein he was injured, and a claim for compensation was made in Massachusetts for the injury which had been received in New Hampshire. In awarding him compensation in Massachusetts, the Court, Pierce, J., said:

> "We think General Laws, c. 152, s. 26, as amended by statute 1927, c. 309, s. 3, should be broadly construed; and that so interpreted, the intent of the legislature is unequivocal, plain and unmistakable that in circumstances like the present, an employee injured [outside of the state] in the performance of work which arose out of and in the course of his employment should have compensation under the Workmen's Compensation Act. See in this connection *Kennerson* v. *Thames Towboat Company,* 89 Conn. 367; *Grinnell* v. *Wilkinson,* 39 R. I. 447; *Cram v. Leonard Crossett & Riley,* 214 Mass. 218; *Post* v. *Berger-Gohlke,* 216 N. Y. 544."

The Workmen's Compensation Act of the State of Maine is very similar to the Vermont Act, and contains the extra-territorial clause. See *Maine General Laws,* 1921, c. 25.

The Maine Act has been construed by the Supreme Court of Maine in the *Saunders Case,* decided March 31, 1927, 126 Maine, 144.

In the *Saunders Case* the deceased, a resident of Maine, was employed by a Maine corporation which did business in Maine and the Province of New Brunswick; his employment contract contemplated his working in Maine and New Bruns-

wick, and in the course of his employment he was accidentally killed at St. Stephen in the Province of New Brunswick. Both employer and employee had accepted the Workmen's Compensation Act of Maine, the provisions of which were almost identical with those of the Vermont Act. Recovery was allowed in favor of the estate of the deceased under the provisions of section 25 of the Maine Workmen's Compensation Act. The Court, Wilson, C. J. (now a member of the Circuit Court of Appeals for the First Circuit, and the Justice who wrote the dissenting opinion in the case at bar), said:

> "It is true that even if the employment was made by the Maine Company in the first instance, in order for his dependents to recover, he must have remained in its employ while working on the Canadian side, and their recovery is by virtue of section 25 of the compensation act, although there appears to be a tendency in the later decisions where the acceptance of the act is contractual and not compulsory, to extend its operations extra-territorially without an express provision to that effect. *Smith* v. *Van Noy Interstate Co.*, 150 Tenn. 25."

4. The Circuit Court erred in that the Court held that the acceptance in New Hampshire by the employer of the Workmen's Compensation Act, Public Laws of New Hampshire, 1926, c. 178, was binding upon the parties in the case at bar to the exclusion of the rights of the parties under the provisions of the Vermont Workmen's Compensation Act.

The opinion of the Circuit Court of Appeals in the case at bar is based substantially upon the fact that the acceptance in New Hampshire by the employer of the New Hampshire Workmen's Compensation Act was binding upon the parties to the exclusion of their rights under the Vermont Act. As the Court, Anderson, J., said:

> "On rehearing, the attention of the Court is sharply directed to the fact that the defendant expressly accepted the

New Hampshire Workmen's Compensation Act, Public Laws of New Hampshire, c. 178. This act reserves in s. 11, to the employer or his legal representative, an action at law for damages on death caused by negligence. It is clear that this act applies to actions for negligence occurring in New Hampshire, and that its acceptance binds the defendant in this action of tort."

Opinion, R. p. 145.

In considering this phase of the case it is important that we should consider somewhat the facts of the case and its history leading up to the acceptance of the Workmen's Compensation Act in New Hampshire by defendant, and where that fact first appeared in connection with the trial of this case.

The defendant is a Vermont corporation with a principal place of business at Bradford, Vt., R. p. 66. It is engaged in the manufacturing and distribution of electric energy. The current is manufactured in Vermont and distributed by wires of the Company through certain sections of Vermont and across the boundary line into New Hampshire. In connection with its New Hampshire properties it of necessity had to employ New Hampshire help to operate in that state.

The plaintiff, Leon J. Clapper, was domiciled in, and a resident of, Vermont. The contract of hiring was made in Vermont. His employment required him to perform services within and without the State of Vermont.

At no time while in the employ of defendant had he ever resided in New Hampshire, and whenever he had any work to perform in New Hampshire, it was of a temporary nature and under the supervision and control of the Bradford office.

At the time he received the injuries complained of in this action, he was temporarily engaged in New Hampshire in performing work upon the defendant's Haverhill substation.

The case at bar was first filed in the state court by the plaintiff, Jennie M. Clapper, who was then a resident of New

Hampshire, in her capacity as administratrix of her brother's estate, R. p. 64.

The case was transferred to the United States District Court upon petition of the defendant by reason of the diversity of citizenship of the parties, R. p. 1.

When the case was filed in the District Court defendant filed an answer and brief statement setting forth therein for the first time the fact that plaintiff's decedent and defendant had accepted the provisions of, and were bound by, the Vermont Workmen's Compensation Act which was a bar to the maintenance of this action in New Hampshire, R. p. 7.

The plaintiff filed a Motion to Reject Defendant's Answer and Brief Statement, and assigned therein four reasons why same should be rejected, but it is important to note at this time and in this respect that plaintiff did not assign as a reason for defendant's answer being rejected that it had accepted the provisions of the New Hampshire Workmen's Compensation Act, R. p. 11.

The Court, in its rescript, denied defendant's motion to dismiss, granted plaintiff's motion to reject defendant's answer, and ordered defendant to go to trial by jury, R. p. 12 But again no reference is made to the acceptance of the Workmen's Compensation Act of New Hampshire by the defendant as a reason or basis for denying defendant's motion to dismiss.

The plaintiff's motion to reject defendant's answer was treated by the trial Court and counsel as a demurrer to defendant's answer and admitted the facts therein set forth. The Court, in its opinion, has so treated the motion. (Opinion, p. 135.)

The defendant's answer was complete in that it contained sufficient facts, if proved, to bar plaintiff's cause of action. By his demurrer, counsel for the plaintiff admitted all of the facts alleged by the defendant in its answer, and therefore obviated the necessity of proving same.

The Court in its rescript said:

"Actions under the Employer's Liability Act in New Hampshire are based on tort, not on contract, and the law of Vermont has no extra-territorial effect." R. p. 12.

By its ruling the Court eliminated the law of Vermont so far as it was applicable to this case, and ordered the defendant to go to trial under the law of New Hampshire.

Unfortunately, the rule in the Federal Court is such that legal problems arising during the course of the trial cannot be transferred to the Circuit Court of Appeals for judicial determination until a judgment has been rendered in the District Court. Were the law the same as in our State Court, upon the Court denying the defendant's motion to dismiss, and granting plaintiff's motion to reject, the case could immediately have been transferred to the Circuit Court upon defendant's exception to the Court's ruling, and the same proposition which is now before the Court would then have been presented for this Court's consideration, and the parties involved would have been saved the time and expense of three jury trials.

Furthermore, the acceptance of the New Hampshire Workmen's Compensation Act by the defendant would not then have been presented to this Court and the plaintiff would have been deprived of that comfort and support which she now attempts to receive from the fact that the defendant had accepted the New Hampshire Act.

Having been ordered to go to trial in New Hampshire in an action brought by the Administratrix of the Estate of an employee injured in New Hampshire, which action was brought under the Employer's Liability Act of New Hampshire, it was incumbent upon the defendant to protect its interests by every defense available to it under the New Hampshire law, and from then on the Vermont law was not available to the defendant as a defense, nor material in any way under the issues raised by the plaintiff.

As a part of the plaintiff's case it appeared that three men from Berlin, N. H., came down and assisted in the construction of the line from Pike, N. H., to Lake Tarleton, N. H.

These men were linemen and did the same kind of work as Clapper and the others in the construction and reconstruction of the line upon which the plaintiff subsequently was fatally injured, R. p. p. 60, 61, 83.

It appearing that the defendant had engaged New Hampshire employees to work in New Hampshire upon that type of hazardous employment which came within the definition of the statute, i.e., "the construction, operation, alteration or repair of wires or lines of wires, cables, switchboards, or apparatus charged with electricity" (N. H. Public Laws, 1926, c. 178, s. 1), it was incumbent upon the defendant, in order to avail itself of the defenses of assumption of risk and negligence of a fellow servant (Public Laws, c. 178, ss. 2, 3, 4), to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act and that same were in force on the date of this accident.

> "In a servant's action for injuries caused by his master's negligence, the burden is on the latter to show that he has accepted the compensation provisions of the employer's liability act (Laws 1911, c. 163); in the absence of proof of such acceptance assumption of the risk is not a defense."
>
> *Spilene* v. *Company*, 79 N. H. 326.

Accordingly, and as a part of the defendant's case, before any evidence was introduced, the defendant offered to prove that it had accepted the provisions of the New Hampshire Workmen's Compensation Act, and that same were in effect on the date of the accident, but the plaintiff admitted the facts to be as stated in the offer and further proof became unnecessary, R. p. 66.

If there was any question on the part of the plaintiff that the defendant had accepted the Workmen's Compensation Act of New Hampshire for the benefit of others than its New Hampshire employees, it had the opportunity then and there to make further inquiry to elicit this information, but from the fact that the facts were admitted to be as offered by

defendant, it is apparent that it was obvious to plaintiff's counsel why the New Hampshire Act had been accepted by defendant.

And, indeed, it is perfectly apparent and obvious to anyone why defendant had accepted the New Hampshire Act. The evidence disclosed that the defendant's lines ran through and served the towns of Haverhill, Woodsville, Bath, Lisbon, Littleton and Bethlehem, all of which were in New Hampshire, R. p. 68.

Assume, for the purpose of argument, that one of the three men who came down from Berlin to assist in the construction of the line, R. p. 60, had been injured within the scope of his employment. Certainly it would have been no defense as to this injured employee for the defendant to assert and rely upon the acceptance by it of the Vermont Workmen's Compensation Act and not the New Hampshire Act. And why? Because the employee from Berlin was domiciled and resident in New Hampshire, the contract of employment with him was made in New Hampshire, and he was governed and controlled by the New Hampshire Act. It can not reasonably, logically and legally be contended that the Berlin employee and Clapper were in the same category and that their cases would be governed by the same Workmen's Compensation Acts.

As the Court said in the case at bar:

> "The defendant company accepted the New Hampshire Act, but neither the deceased nor his representative ever did. While the defendant's reasons for so doing were not disclosed by direct testimony, it appears in the record that its operations extended some distance into New Hampshire, and it perforce must at times, at least, have employed men in that State as well as in Vermont. If it wished to retain its common law defenses as to these men, it must accept the act."
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> Opinion, p. 136.

Although plaintiff has cited several sections of the New

Hampshire Workmen's Compensation Act in support of his contentions and relies entirely upon the acceptance by the defendant of the New Hampshire Act as a basis for his right to maintain this action, the fact that the defendant had accepted the New Hampshire Act in no way controls or affects this action and furthermore, is not properly before this Court for consideration in passing upon the issues now involved.

The defendant is entitled to have this Court consider the question now involved upon the status of the record and pleadings at the time the Court handed down its Rescript denying defendant's motion to dismiss. As the defendant under the Federal procedure was prohibited from transferring its exception upon the record as it then stood, this Court should consider the exceptions in the order in which they were raised during the progress of the trial and upon the evidence and pleading introduced prior to the taking of the exception, not upon evidence which appeared subsequently in the trial and introduced in connection with an absolutely foreign matter to the issue now being considered.

For the reasons stated, the defendant contends that the fact that the defendant had or had not accepted the New Hampshire Workmen's Compensation Act at the time of the accident in question is not properly before this Court at the present time.

In the case of *Pickering* v. *Industrial Commission of Utah*, 59 Utah 35, the Court was considering the case on appeal from a decision of the Commission denying compensation to the employee under the law of Utah. The contract of employment was made in the State of Utah and the plaintiff had worked for the defendant in that state. The defendant secured a contract for the construction of a highway in the State of Colorado, and sent the plaintiff to Colorado to work as Superintendent of Construction. While in the performance of this work in Colorado, the plaintiff was injured.

The Supreme Court of Utah held that the Workmen's Compensation Act of Utah applied, even though the injury

occurred in the State of Colorado, *and even though the employer carried insurance covering injuries under the Compensation Act of the State of Colorado.*

In the case of *Zurich Accident & Liability Ins. Co.* v. *Industrial Commission of Wisconsin,* 213 N. W. 630, it appeared that the employer corporation was engaged in business in the State of Wisconsin. The President of the company was the "field man" and supervised the construction work of the company. The corporation obtained a contract to construct a bridge in Texas, and the President of the company supervised the construction of the bridge. The company obtained separate insurance covering liability under the Texas Workmen's Compensation Act.

While supervising the construction of the bridge in Texas, the President of the corporation was killed, and his widow applied to the Wisconsin Commission for a compensation award under the Wisconsin Act. The insurance company denied liability on the grounds that the injuries sustained were subject to compensation under the Texas Compensation Act, but not under the Wisconsin statutes. It took the position that the injury having occurred in Texas, the rights and remedies were governed by the Texas Compensation Act. The Supreme Court of Wisconsin held that the rights and remedies were governed by the Workmen's Compensation Act of Wisconsin and not by the Texas Act, and said:

> "Whether the deceased was under the Wisconsin or Texas Compensation Act depends upon whether his employment was pursuant to a Wisconsin or a Texas contract. On this question there can be no doubt. He went to Texas as a representative of the Company by virtue of his contract of employment made here in Wisconsin. So far as he was concerned, there was no Texas contract. The fact that he went to Texas, took charge of the work, hired and discharged men, and *secured workmen's compensation insurance in Texas,* did not make his employment a Texas employment, and he was at all times subject to the Workmen's Compensation Act no matter where he was performing services growing out of and

incidental to that employment. The conclusion that at the time of his death he was subject to the Wisconsin Compensation Act presents little difficulty."

A review of the above authorities should satisfy this Court that the acceptance in New Hampshire by the employer of the New Hampshire Workmen's Compensation Act does not bind the defendant in this action to the exclusion of the rights of the parties under the provisions of the Vermont Act.

5. The Circuit Court erred in that the Court held that when the Bradford Electric Light Company, Inc., invoked and defended under the Workmen's Compensation Act of New Hampshire, it then assented that the New Hampshire Statutes should alone govern the rights of the estate of Leon J. Clapper in the case at bar.

It is difficult to conceive how the Court can hold that when the defendant invoked and defended under the Workmen's Compensation Act of New Hampshire, it then assented that the New Hampshire statutes should alone govern the rights of the plaintiff in the case at bar.

The only contract of employment existing between the plaintiff and defendant is that which was entered into in the State of Vermont wherein both parties resided, and the terms and provisions of the Vermont Workmen's Compensation Act were embodied in and became an integral part of the contract of employment. The cases cited *supra* support the position of defendant that the parties to the contract of employment are bound by the exclusive features of the compensation act, and the Court's attention has already been called to the exclusive rights, remedies and liabilities provided for in the act. The New Hampshire Workmen's Compensation Act was intended for the benefit of residents of New Hampshire, or for the benefit of those persons whose contract of employment was entered into in New Hampshire.

As stated supra, the contract of employment between plaintiff and defendant was entered into in Vermont. No new con-

tract of employment was ever entered into between these parties in New Hampshire. Wilson, J., appreciated the significance of this situation because he said in his dissenting opinion, R. p. 148:

> "There was no new employment in New Hampshire of the deceased. There was no acceptance of the New Hampshire act by the deceased or his representative.
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> * * * *
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> "As the plaintiff saw fit to institute a suit under another New Hampshire statute, the acceptance of the New Hampshire compensation act by the defendant should not be construed as a waiver of any legitimate defense to the suit the defendant might have under the established rules of comity by virtue of a valid contract it had with the deceased."

It is true that the defendant had accepted the provisions of the Workmen's Compensation Act of the State of New Hampshire, but it was done for the protection of the defendant and for the benefit of those employees of defendant who were hired and resided in New Hampshire.

The contention of the plaintiff is that a common law action can be maintained in New Hampshire against this defendant for an accident which occurred in New Hampshire, regardless of the contract of employment entered into in Vermont which embodied the provisions of the Workmen's Compensation Act of Vermont, and defendant can not avail itself of any of the defenses under the Vermont Act.

The defendant's lines extended into New Hampshire, and it of necessity had to employ residents of that state.

The Court, Wilson, J., said, R. p 147:

> "The defendant had also accepted the New Hampshire compensation act, c. 178, R. S., and complied with section 4. It is not really contended, however, that this was done because of the fact that some of its workmen living and employed in Vermont were also sent into New Hampshire to do service work, as it also appears that by reason of the exten-

sion of its lines into New Hampshire, it was at times, if not continually, obliged to employ residents of that state.

"Unless the fact that the defendant invoked and defended under the New Hampshire Employers' Liability and Compensation Act after the trial Judge ruled that the Vermont contract would not be recognized in New Hampshire must be construed as an assent that the New Hampshire statutes should alone govern the rights of the plaintiff's intestate in this case, the parties stand as though the Employers' Liability and Compensation Act of New Hampshire did not exist. The plaintiff brings this action under New Hampshire's Lord Campbell Act, and the defendant retains all its defenses at common law."

The principal issue in the case for the consideration of this Court is whether the trial court was in error when he "ruled that the Vermont contract would not be recognized in New Hampshire." If he was in error in so ruling, what the defendant by its counsel did thereafter as a matter of procedure is immaterial. Having ruled that the Vermont contract would not be recognized in New Hampshire, and having ordered the defendant to go to trial in New Hampshire under the common law, what could the defendant do but avail itself of every defense known to it until the error committed by the Court had been rectified? Counsel could not withdraw from the case at that stage and permit the case to go to the jury under the ruling made by the Court without presenting a defense.

As stated *supra*, the main issue in this case was raised by the pleadings, and what took place after the Court ruled that the contract would not be recognized in New Hampshire should not be confused with, or permitted to cloud, the issue clearly presented. The defendant should not be penalized for an error committed by the Trial Justice in erroneously holding that a valid contract entered into in Vermont between the parties would not be recognized or enforced in New Hampshire. The defendant never willingly, voluntarily or knowingly assented that the New Hampshire statutes should

alone govern the rights of the parties in the case at bar. Its only assent thereto is inferred from the fact that it invoked and defended under the Workmen's Compensation Act of New Hampshire, but in view of the manner in which the trial was conducted, it can not reasonably and fairly be said that the defendant ever intended to or did assent to the rights of the parties being governed by the New Hampshire Statute.

V.

CONCLUSION.

The plaintiff justifies his position in the place where he was injured by reason of a contract of employment existing between him and the defendant. No new contract of employment was made in New Hampshire, and therefore the plaintiff, at the time he was injured, was acting under and pursuant to the contract of employment entered into in Vermont. Courts have repeatedly held that Workmen's Compensation Acts of the elective type such as the Vermont Act, entered into and became a part of the contract of employment. If it were not for the contract of employment existing between the plaintiff and defendant, the plaintiff at the time of receiving his injury would have been a trespasser and without right upon the defendant's property.

The very foundation of the plaintiff's whole case is the contract of employment entered into in Vermont. As the Court said in the case of *Atchison, Topeka & Santa Fe Railway* v. *Sowers*, 213 U. S. 55, 67,

> "It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

Accordingly, if the plaintiff intends to benefit by the Vermont contract of employment as the foundation for his case, he should accept as a part thereof and be bound by the bur-

dens as well as the benefits which go with the contract.

"We are of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the main purpose of the New Hampshire act, or inimical to the welfare of its citizens, and according to the trend of recent decisions in other jurisdictions, the contract of hire under the Vermont act upon the principles of comity contains a good defense to an action under the New Hampshire death statute, there having been no contract of hire in New Hampshire."

Opinion, R. p. 144.

Wilson, J., in his dissenting opinion used the following language:

"I desire particularly to go on record as opposed to the ruling of the majority opinion that New Hampshire will not recognize a contract of employment under the Workmen's Compensation Act of another state that requires the assent of the workman before an injury to entitle him to its benefits on the ground that it is contrary to the public policy of New Hampshire. The New Hampshire Court has never so declared, and we can not conceive of any court holding that a statute so generally held to be conceived in the interest of the working man was inconsistent with the welfare of the citizens of New Hampshire. See *Mulhall* v. *Mfg. Co.*, 80 N. H. 194.

* * * *

"I am firmly of the opinion that there is nothing in the contract entered into between these parties in Vermont that is contrary to the purpose of the New Hampshire Compensation Act as defined by the Court of that state in *Mulhall* v. *Nashua Mfg. Co.*, 80 N. H. 194, or inimical to the welfare of its citizens and the public policy of that state; and according to the trend of the decisions in other jurisdictions, the rights of the parties should have been held to be governed by the Vermont contract, which provided for the plaintiffs only an exclusive relief for the death of her intestate."

Opinion, R. pp. 148, 152.

We respectfully submit that a careful review and consideration of the authorities cited herein will satisfy this Court that the judgment rendered by the Circuit Court of Appeals should be reversed.

The defendant desires to be heard orally.

Respectfully submitted,

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